diction in some cases of minor injuries.[23] Damages have frequently been awarded to a shipper who has been overcharged, whether directly [24] or indirectly,[25] since such overcharge is prohibited by the Act, if direct, and if indirect is effected by methods prohibited by the Act.[26] Among such indirect methods of effecting an overcharge is the negligent misrepresentation as to cost of transportation, referred to above.[27] And damages have even been given by the Commission in the still more extreme case of a misrepresentation (here a failure to post a new and higher tariff, relied on by plaintiff to his indirect loss) that was neither intentional nor negligent.[28] The failure to post the tariff, however, was, regardless of its cause, a violation of the Act, and hence the Commission was right in holding the carrier for any damage caused thereby.

The Commission is no doubt wise in declining to let its tort jurisdiction crystallize into the common-law classifications of torts. Such a refusal is in accordance not only with the purpose of section 16, but also with the growing tendency to abolish all classifications of torts.[29] But, nevertheless, it is desirable that the Commission realize clearly what it is doing, in the light of the common law, when it awards damages in a given case.

CONTRACTS TENDING TOWARD MONOPOLY. — The prevailing economic theories tell us that a monopoly is injurious to the public interest and to be avoided. By monopoly apparently is meant a real monopoly, an exclusive control of a certain business by one group of persons — a situation such that all competition is permanently excluded.[1] A monopoly prevents the salutary action of competition upon prices, and makes the desire of the monopolist the chief and perhaps the only determinant of price. Further, it closes the field of the particular business to all others

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[23] See Joynes *v.* Pennsylvania R. Co., 17 Int. Com. Rep. 361, 365 *et seq.* This case shows a strong tendency on the part of the Commission to limit its awards to cases where the tort has what might be termed an "interstate rate savor," analogous to the "maritime savor" test for an admiralty court's jurisdiction in some cases.

[24] "The Act entitled shippers to just and reasonable transportation charge, and if these carriers have imposed upon these complainants rates in excess of this they have thereby damaged the complainants to the extent to which reparation should be allowed." *In re* Advances on Live Stock, 28 Int. Com. Rep. 332, 335. See also Michigan Hardware Manufacturers' Ass'n *v.* Transcontinental Freight Bureau, *supra.*

[25] Damages given for higher rates collected because of misrouting: see Kile & Morgan Co. *v.* Deepwater Ry. Co., 15 Int. Com. Rep. 235; because of misquotation concerning route, rate or privileges: Kiel Woodenware Co. *v.* Chicago, Milwaukee & St. Paul Ry. Co., 18 Int. Com. Rep. 242; Stone & Meyers Co. *v.* Toledo, St. Louis & Western Ry. Co., Unreported Opinion A-52; Maldonado & Co. *v.* Southern Pacific Co., Unreported Opinion A-18; Rutland & Rutland *v.* Chicago, Rock Island & Pacific Ry. Co., *supra* (but *cf.* Faribault Furniture Co. *v.* Chicago Great Western R. Co., 25 Int. Com. Rep. 40, 41); because of furnishing unnecessarily expensive equipment: Calvi *v.* Chicago, Milwaukee & St. Paul Ry. Co., Unreported Opinion 461; Moline Plow Co. *v.* Chicago, Milwaukee & St. Paul Ry. Co., Unreported Opinion 419.

[26] For these methods, see note 25, *supra.*

[27] See note 4, *supra.*

[28] Rutland & Rutland *v.* Chicago, Rock Island & Pacific Ry. Co., *supra.*

[29] See the references in note 20, *supra;* also Jeremiah Smith, "Tort and Absolute Liability — Suggested Changes in Classification," 30 HARV. L. REV. 241, 260.

[1] See ELY, MONOPOLIES AND TRUSTS, for a full discussion of the question.

and from this aspect also is contrary to the public interest.[2] Accepting this view, it follows that where any transaction tends, however slightly, toward such a condition, the law is deterred from recognizing it. The extent of that deterrence varies directly with the extent of the tendency toward monopoly.

Whether or not a contract or combination should be held illegal, as in restraint of trade, can be correctly determined only by a balance of the social interests in favor of the transaction against the tendency toward monopoly inherent in the particular case.[3] For instance, a contract by a single individual not to engage in a certain business, without more is clearly illegal.[4] Opposed to the inertia engendered by the general policy to allow freedom of contract, is the consideration that *one person* is prevented from competing in this business. This, it is clear, tends toward monopoly, very slightly perhaps, but nevertheless surely, — and heavily enough to turn the evenly balanced scale against the contract.[5]

Where, however, there is some affirmative policy on the other side, which outweighs the evil of the tendency toward monopoly, such a contract should be upheld. In the sale of a business, where a covenant not to engage in that business is given by the seller to the buyer, and such covenant is no broader than necessary to make the sale complete, the affirmative considerations in favor of permitting a person to sell his business freely and for the best price, and the general policy in favor of freedom of alienation, easily prevail. The cases generally are in accord that, upon the sale of a business, a restriction coterminous with the business sold is valid.[6]

On the other hand, again, there are many cases where the tendency toward monopoly is so very strong, where the situation approaches so closely a real monopoly, that the deterrent interests must prevail.[7] Such a case is presented by a combination of business units, when the power and the intent to exclude are coexistent.[8]

The courts, unfortunately, have not always recognized the peculiar necessity in these cases of the balancing process suggested above. Where most clearly they should particularize and examine the facts and circum-

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[2] It is not our intention, nor indeed our province here, to go into the soundness of these conceptions, as economic principles. They are almost universally accepted, and the law would be failing in its purpose, were it to practise an economics of its own, adverse to the tenets of contemporaneous business faith.

[3] We shall discuss here only the cases which tend toward the ultimate evils stated *supra*, through the medium of a monopoly. The same principles of balance should of course govern where some other method is employed. See 30 HARV. L. REV. 68, where the cases dealing with price maintenance contracts are discussed.

[4] Colgate *v.* Bacheler, Cro. Eliz. 872; see Prugnell *v.* Gosse, Aleyn's Rep. 67; Mitchell *v.* Reynolds, 1 P. W. 181, 196.

[5] The considerations against pauperism and against depriving the community of a useful servant lack vitality in the present economic system and so need not be considered. The tendency toward monopoly and its resultant evils is, in the present order, the only potent social objection to the legal recognition of restrictive contracts, or combinations of business units.

[6] Mitchell *v.* Reynolds, 1 P. W. 181; Roberts *v.* Lemont, 73 Neb. 365, 102 N. W. 770; Trenton Potteries Co. *v.* Olyphant, 58 N. J. Eq. 507, 43 Atl. 723.

[7] There would seem to be no affirmative policy, as we see things now, which could counterbalance the evil results of a real monopoly.

[8] See Dunbar *v.* Am. Tel. & Tel. Co., 238 Ill. 456, 87 N. E. 521.

stances of the instant case, they frequently indulge in a recitation of the meaningless rule of thumb that a general restraint is void and a partial restraint valid if reasonable, and declare the contract illegal because it savors of an interference with competition, where an intelligent weighing of the interests would lead to a directly opposite result. A recent Alabama case is open to just this criticism. The plaintiff, a dry-cleaning company, contracted with five laundry companies in the city of Birmingham, one of which was the defendant, that the latter should announce to their customers that they were acting as collection and delivery agents for the plaintiff company and should collect soiled goods and make return deliveries of cleaned goods. The laundry companies promised in addition to collect only for the plaintiff company and not to go into the dry-cleaning business in the locality. The plaintiff company agreed to pay the laundry companies twenty-five per cent of the returns on the dry-cleaning business which they brought in, and not to go into laundry business in the locality. There were other laundry concerns, and other dry-cleaning companies operating in this particular commercial community. The defendant company failed to perform and suit was brought to enjoin them from breaking their contract. The court held that the injunction should be denied, and in what must perhaps be taken as a *dictum*,[9] though a very strong one, declared the arrangement to be illegal as in restraint of trade.[10]

Let us analyze the case, first considering it as a mere contract between strangers. We have, then, merely five laundry companies contracting to act as agents for the collection of goods exclusively for a certain dry-cleaning company, and agreeing not to go into the dry-cleaning business.[11] An agreement by an agent not to go into the principal's business is certainly a reasonable protective requirement from the standpoint of the principal. The contract here, then, may be said to be fairly necessary in order that the laundry companies should get the agency. The policy in favor of enabling people to make such dealings with each other is very strong.[12] On the other side, this contract was one of five of a similar nature, so that it was part of an arrangement whereby five companies would be prevented from going into this business. There is no exclusion of others here, — the field is left open, and indeed the facts show that there were other dry-cleaning businesses in the locality, so that there is not even a temporary exclusive possession of the field.[13] The tendency

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[9] The court held that, even though the contract was enforceable at law, yet it was sufficiently against public policy to lead them in their discretion to refuse the injunction. This proposition is difficult of support. They took the additional ground that the practical difficulties were too great here for equity to enforce the contract, and refused to enforce the negative agreement as a means of bringing about the performance of the affirmative. This, of course, is aside from our point. For a discussion of the principles involved in this latter proposition, see Lumley *v.* Wagner, 1 De G. M. & G. 604.

[10] American Laundry Co. *v.* E. & W. Dry-Cleaning Co., 74 So. 58.

[11] For the effect of the agreement on the other side, by the dry-cleaning company not to go into the laundry business, see *post*, note 19.

[12] See Hitchcock *v.* Coker, 6 Ad. & E. 438; U. S. *v.* Addystone Pipe & Steel Co., 85 Fed. 271, 281.

[13] Even though there were such a temporary exclusive possession, the affirmative considerations mentioned *supra* would prevail.

toward a real monopoly is very slight, merely the deterrence of five companies not in the business from entering the business. This cannot fairly be said to overcome the affirmative considerations.[14]

It might well be urged, also, that the laundry company in question was selling a part of its good-will. The laundry business is closely akin to the dry-cleaning business, and the good-will of a laundry company may well include a share of good-will as to dry-cleaning. If this is so, as the contract is clearly not broader than necessary to effect the complete sale of such good-will, the affirmative considerations are strengthened.

The transaction here, however, may be considered from a different angle. Although the court does not consider the fact, the evidence shows that the dry-cleaning company was owned by the principal stockholders of the laundry companies. This brings in a new element, — combination. As to the tendency toward monopoly the case remains the same.[15] But the affirmative considerations arising from the contract of agency, and from the sale of good-will, are replaced by the social interest in combinations.[16] Larger commercial units are to be favored because of their greater efficiency and ability to meet the needs of our complex economic system. Further, they tend strongly toward stability, the desideratum of every commercial community. Still further, they make against a condition of too much competition, one of the recognized evils of the competitive system.[17] Viewing the transaction as a combination of the stockholders of the laundry companies, the case for the contract can only be strengthened.[18] In so far then as the court refused the injunction sought

[14] The agreement to collect exclusively for the dry-cleaning company adds nothing against the contract. It in no way excludes others from the dry-cleaning field. There certainly were ways of collecting goods to be dry-cleaned other than the medium of laundry companies. Even if not, there were other laundry companies. To the extent then of preventing these five laundry companies from collecting for any other dry-cleaning company, it hampered competition in the dry-cleaning business, and that is all. The tendency of this toward monopoly is too slight to be of any real force.

This differs from the case of an exclusive agreement with a public service company, where by force of the fact that no one could get into the business of the public service company without a franchise, and that, as the field was adequately looked after by the existing company, a franchise probably could not be obtained, a real monopoly is created by such an exclusive contract. See Union Trust & Savings Bank *v.* Kinloch Long Distance Tel. Co., 258 Ill. 202, 101 N. E. 535.

It might also be urged that the agreement prevented these five companies from competing with other concerns to collect for other dry-cleaning companies, and in this way tended toward a monopoly in the collection business, but this, like the similar tendency in the dry-cleaning business, is too slight to be given any real consideration.

[15] Nothing appears in the facts to show that the dry-cleaning company occupies a predominant position in the business in the particular community, which the authorities, correctly or not, apparently have come to consider an important factor. See Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666; Cummings *v.* Union Blue Stone Co., 164 N. Y. 401, 58 N. E. 525. See *post*, note 18, for a consideration of the bearing of mere size upon the question.

[16] It would seem clear that where the stockholders of the two companies are the same, the policy favoring the free creation of agencies and that favoring the free alienation of acquisitions cease to apply.

[17] See N. W. Salt Co. *v.* Electrolytic Alkali Co., [1914] A. C. 461, 469; Ontario Salt Co. *v.* Merchant's Salt Co., 18 Grant U. C. 540.

[18] It seems a fair assertion that nothing short of the situation in Dunbar *v.* Am. Tel. & Tel. Co., *supra*, note 8, where the combination was powerful enough by the use of unfair methods of competition, — local price cutting, etc. — to exclude all others from the field, and where the intent to so act was present, should prevail against the con-

on the grounds that the contract was illegal, the decision cannot be justified.[19]

From the above discussion it must be apparent that the success of any attempt to balance the interests for and against a contract or combination depends absolutely upon a true valuation of the weight to be given the various considerations *in the particular case*. This, in turn, requires a determining body, able to go into the details of the business under consideration, and having its finger always upon the pulse of the commercial situation. It is obvious that a court is not, nor can be, such a body from its very nature. The seeker for an entirely satisfactory method of handling the problem must advocate that some such body should hold the scales.

DEMURRAGE CHARGES ON PRIVATELY OWNED RAILROAD CARS. — The United States Supreme Court has recently upheld the provision of the Uniform Demurrage Code[1] imposing a charge upon privately owned

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siderations in favor of combination. A great many cases appear to have taken the position that mere size, a predominant position in the business, should be enough to make a combination illegal. Whether these cases hold that such size so tends toward monopoly that *per se* it makes the combination illegal, or that the size is *prima facie* evidence of intent to exclude and that therefore unless there is rebutting evidence you have the situation of the Dunbar case, or whether they go upon a third tack and are attempting to determine the boundaries of the policy in favor of combinations, and to fix the limits of this policy, it is difficult to discover from an examination of the cases. Upon whichever of these grounds the cases rest, it would seem that one of two answers can be given to them, — either that the proposition is fallacious, which is the case in the first and second alternatives, or that the courts are not capable of going into the intricacies of business facts necessary to an accurate determination of the question and so should not make the attempt, which is the case in the first and third alternatives.

Where a combination is formed agreeing to a set price and has a predominant position in the business, there is some ground for presuming that the intention of the parties is to exclude others, and as they have the power to do so, for holding the combination illegal. But mere size, even added to a purpose to fix prices, but not setting a hard and fast price, does not justify this presumption.

[19] The agreement by the dry-cleaning company not to go into the laundry business presents an even weaker case for illegality than that by the laundry companies, so it adds nothing against the contract.

[1] The Uniform Demurrage Code was adopted in 1909 by the National Convention of Railway Commissioners, and, in the same year, endorsed by the Interstate Commerce Commission, which recommended that its rules be made effective on interstate commerce throughout the country. "These rules provide that after two days' free time 'cars held for or by consignors or consignees for loading' or unloading shall (with certain exceptions not here material) pay a demurrage charge of $1 per car per day. Private cars are specifically included by the following note: 'NOTE. — Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

"'(Empty private cars are in railroad service from the time they are placed by the carrier for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service, are in railroad service from the time they are placed by the industry upon designated interchange tracks, and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)'" Brandeis, J., in Swift & Co. *v.* Hocking Valley Ry. Co., U. S. Sup. Ct., Oct. Term, 1916, No. 376. See *In re* Demurrage Investigation, 19 Int. Com. Rep. 496.